United States of America

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 636

UNITED STATES OF AMERICA,
Petitioner,
vs.
FRANK DELIA

ON WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE
SIXTH CIRCUIT

BRIEF FOR FRANK DELIA

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OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 26-31) is reported in 131 F(2) 614.

JURISDICTION

Defendant accepts the statement of the United States as to jurisdiction.

QUESTIONS INVOLVED

1. Whether Section 2(f) of the Federal Firearms Act should be construed to prohibit

(a) receipt of firearms or ammunition, if at any time in the past they had moved in interstate commerce, or

(b) receipt of firearms or ammunition in the course of interstate commerce.

2. Whether the conviction should be set aside because defendant was tried upon the construction of Section 2(f) that defendant was guilty if the firearm and ammunition that he possessed had at any time in the past moved in interstate commerce.

3. Whether Section 2(f) of the Federal Firearms Act is constitutional as a valid regulation of interstate commerce under Article I, Section 8 or unconstitutional under the Tenth Amendment as an exercise of power reserved to the states.

4. Whether the trial court should have directed a verdict because the presumption was rebutted, there being no evidence of receipt in interstate commerce.

5. Whether the presumption clause of Section 2(f) of the Federal Firearms Act is unconstitutional under the Fifth Amendment.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fifth Amendment in pertinent part provides:

> "No person shall be * * * deprived of life, liberty, or property, without due process of law * * *."

U. S. Constitution, Article I, Section 8, in pertinent part, provides:

> "The Congress shall have power to * * * regulate commence with foreign nations and among the several states * * *."

The Tenth Amendment in pertinent part provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Section 2(f) of the Federal Firearms Act of June 30, 1938, 52 Stat. 1250 (15 U. S. C., section 902(f) in pertinent part provides as follows:

> "It shall be unlawful for any person who has been convicted of a crime of violence * * * to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was * * * received, * * * by such person in violation of this Act."

STATEMENT

Defendant accepts the statement of the United States in its brief.

SUMMARY OF ARGUMENT

I. This case was tried in the district court upon the construction of Section 2(f) of the Federal Firearms Act to prohibit receipt, by a person previously convicted of a crime of violence, of a firearm or ammunition if such articles had at any time *in the past* been the subject of interstate commerce. This construction of Section 2(f) is demonstrated not only by the language of Section 2(f), particularly as compared to other sections of the act, but also by the language of the indictment, the opening statement of the U. S. attorney to the jury, the proofs introduced by the U. S. attorney, and the court's charge to the jury.

If Section 2(f) is construed otherwise the conviction must be reversed because Delia was tried upon the foregoing construction of the statute.

II. To prohibit receipt of a firearm or ammunition which had at any time in the past been the subject of interstate commerce, is unconstitutional because it is not a valid regulation of commerce under Article I, Section 8, but an exercise of police power reserved to the states under the tenth amendment.

Firearms and ammunition may be lawfully and legally transported from one state to another and come to rest within the state. Firearms and ammunition were at rest within the various states when the act became effective. Congress had no power to regulate the subsequent possession of articles after they had come to rest within a state, such regulation having no relationship to their prior interstate transportation.

III. If subsection 2(f) is construed to prohibit receipt only in the course of interstate commerce as was done

by the Circuit Court of Appeals, the trial court should have directed a verdict for defendant because there was no evidence to go to the jury. The presumption is only a *prima facia* presumption and goes only to the order of proof. The trial court agreed that the presumption had been rebutted. There was no other proof of receipt in interstate commerce. The trial court denied the motion for directed verdict because of the construction of the statute that defendant was guilty if at any time *in the past* the articles had been transported in interstate commerce.

IV. The Circuit Court of Appeals construed Section 2(f) to prohibit receipt of a firearm or ammunition only in the course of interstate commerce, but held that the presumption contained in Section 2(f) to the effect that such receipt in interstate commerce should be presumed from the fact of possession was invalid. "There must be some logical connection or relationship based upon common knowledge, reason and experience between the proven fact or facts and the inferred or presumptive fact. If such connection does not exist it follows obviously that a defendant is exposed to conviction upon evidence which has no probative value; or, put in another way, upon no evidence at all. It follows further that if at the close of the Government's proof the accused seeks to defend himself, the burden is cast upon him of explaining a situation which up to that point had no incriminating tendency or effect" (R. 30).

A. The Government concedes that possession does not raise an inference that ammunition was received in interstate commerce or that a firearm was received subsequent to the effective date of the act. Neither does possession raise an inference that a firearm was received by a particular defendant in the course of interstate commerce at any time. The fact that acquisition of certain types of

firearms by persons previously convicted of violence is prohibited by both Federal and State law does not raise a presumption that such articles were obtained in violation of Federal law rather than in violation of state law. There is indeed a probability that the articles were received in intrastate commerce rather than interstate because many states do not have firearms control acts and others prohibit only certain types of firearms.

B. Mere unavailability of proof to the Government does not sustain the validity of a presumption in the absence of a rational connection between the facts presumed and that proven. In any event it will not be imposed where it may result in a "probability of injustice and preponderating hardship to the defendant" which would result if defendant were required to testify because the trier of the fact is likely to disbelieve a defendant who had been previously convicted of a crime.

C. Congress does not have the power to prohibit all possession of firearms as a regulation of probably subsequent interstate transportation. If it had such power it did not intend Section 2(f) to constitute an exercise of such power. Section 2(f), together with the entire Federal Firearms Act is predicated upon a regulation of present interstate commerce and cannot be construed otherwise.

D. and E. The defendant is a person who is sufficiently injured to be entitled to question the constitutionality of the Act. Taken in its entirety the presumption contained in Section 2(f) deprives defendant of a fair trial.

ARGUMENT

I.

CONSTRUCTION OF THE STATUTE

Section 2(f) may be construed either: (1) to prohibit receipt of a firearm or ammunition in the course of interstate commerce; or (2) to prohibit receipt of a firearm or ammunition which at any time in the past had moved in interstate commerce.

The Circuit Court of Appeals construed the statute to prohibit receipt of a firearm or ammunition in the course of interstate commerce, but held the statute unconstitutional because of the fact that interstate commerce was presumed from the mere fact of possession. This decision, of course, made unnecessary the consideration of other issues raised by the defendant.

However, the case was not tried in the District Court upon this construction of the statute, but was tried, and we believe correctly, on the theory that Delia was guilty if the firearm and ammunition contained therein had at any time in the past, even prior to the effective date of the act, been the subject of interstate commerce.

That such a meaning is what Congress intended appears from the language of the statute, which makes it unlawful "to receive any firearm or ammunition *which has been* shipped or transported in interstate or foreign commerce." The words "which has been" denotes a past transaction already completed.

Had Congress intended to describe the article as one received *in the course of* interstate commerce instead of one shipped or transported in interstate commerce *in the past*, it could have omitted after the word "ammunition" the

three words "which has been." The provision would then make it unlawful "to receive any firearm or ammunition shipped or transported in interstate or foreign commerce."

Furthermore, if it were not the intent of Congress to prohibit receipt of a firearm or ammunition which at any time in the past had moved in interstate commerce, there appears to be no good reason for making two subsections out of the subject matter of subsection (e) and subsection (f). Subsection (e) makes it unlawful "to ship, transport, or cause to be shipped or transported in interstate or foreign commerce any firearm or ammunition." It would have been a simple matter to add the word "receive" to the list of unlawful acts in this section. That Congress did not do this indicates that it intended to prohibit not only the receipt of a firearm or ammunition *in* interstate or foreign commerce, but also receipt of an article which at any time in the past had moved in interstate commerce.

Whether or not this construction is correct, the case was tried in the District Court upon such a construction.

(a) In the indictment, the Government charged that "Delia * * * did * * * *receive and possess* a firearm which firearm had *therefore* been shipped and transported in interstate commerce" (R. 5). The corelated use of the words "receive and possess," and the use of the word "therefore" all indicate the conception on the part of the U. S. Attorney in drafting the indictment that Delia was guilty if the gun that he possessed had at any time *in the past* been the subject of interstate commerce.

(b) This was also the construction of the U. S. attorney who tried the case, who in his opening statement explained the nature of the offense to the jury, using the word "previously" as equivalent to the word "therefore" of the indictment. "Frank Delia stands charged with *possession*,

with *receiving and possessing* a * * * revolver * * *, which revolver had *previously* been shipped in interstate commerce * * *" (R. 7, 8).

(c) That the U. S. attorney so construed the statute is further indicated by the fact that he subpoenaed experts and affirmatively introduced proof that the firearms and ammunition had sometime *in the past* been the subject of interstate commerce, by proving that the firearm and ammunition were originally manufactured outside of the State of Michigan. This evidence had absolutely no probative value whatsoever that Delia received the article *in the course* of interstate commerce. On the other hand, the evidence was conclusive that the article must have sometime *in the past* been the subject of interstate commerce.

(d) It is clear that the trial court also so construed the statute concerning the question of interstate commerce. The court charged:

> "* * * The theory of the government is that this *gun or revolver was not manufactured in Michigan; therefore someone brought it into Michigan*, either in shipment, or otherwise, brought it in; and the theory of the government is that it was in interstate commerce from the state where it was made, and was *subsequently* found upon this day in question in Detroit, Michigan, in the hands of the defendant, together with the cartridges which were contained in the revolver" (R. 17).

The foregoing language clearly demonstrates the court's construction of the statute as establishing guilt if a firearm or ammunition "previously" in interstate commerce were "subsequently" "received or possessed" by defendant.

The significant language of the indictment "*receive and possess* • • • firearm which had *theretofore* been shipped and transported in interstate commerce" (R. 5) is also used by the court in a later portion of the charge:

> "So, the first question for you to determine is this: Has the government, under the rules of law which I have given you, established the fact that he was a person, the defendant, who had been previously convicted of a crime of violence; and that he did unlawfully, wilfully, feloniously and knowingly, *receive and possess* the firearm which has been described here, and the cartridges, which firearm had *theretofore* been shipped and transported in interstate commerce?" (R. 20)

The court further charged the jury that the Government did not have to rely upon the presumption contained in the statute to establish interstate commerce because such commerce had in fact been proven.

> "And if he received it from someone, whether he knew it was in interstate commerce or not, would make no difference, because the government claims to have proven here, and *the evidence appears to be uncontradicted, that this revolver was involved in interstate commerce;* it came from one state into the state of Michigan. And it claims that by reason of the fact that this revolver was never manufactured in Michigan, but was manufactured in another state" (R. 20).

The clear inference of the court is that the government's proof of interstate commerce was conclusive. The proof, of course, was only that the revolver had some time *in the past* been in interstate commerce.

(e) In the last paragraph of the charge, the court instructed the jury that the presumption had "little weight" (R. 22). This was given in response to defendant's request to charge that the presumption had "no weight," and was understood by counsel for defendant and by the court to be substantially the same as this request and was without doubt so considered by the jury. If the presumption had no weight, the case could have been submitted to the jury only if there was other evidence to affirmatively prove interstate commerce. There was such evidence, which, as the court said, "appears to be uncontradicted" (R. 20). However, this evidence proved only that the articles had sometime *in the past* been the subject of interstate commerce.

The court charged the jury to acquit defendant, if they believed his testimony that he picked up the revolver in self-defense and for his own protection after having been dropped by one of several persons who attacked him, on the premise that such facts, if true, would show that he had no connection with the revolver and not on the premise that such facts would negative the presumption of interstate commerce. The court clearly charged that the government had proved the requisite interstate commerce by "uncontradicted evidence" (R. 20). It is clear that the court considered defendant's defense as going only to the question of his connection to the revolver not to interstate commerce.

(f) Had the case been tried on the construction of the statute as prohibiting only receipt in the course of interstate commerce, it would have been necessary for the jury to find that the defendant received the firearm *subsequent* to the effective date of the Act. This could have been based upon affirmative proof upon the presumption. The record discloses no evidence and no charge by the court of a

presumption, of this requirement. From this we must conclude that defendant was not convicted of receiving a firearm and ammunition in interstate commerce subsequent to the effective date of the act but was convicted of receiving and possessing a firearm and ammunition which had at some time in the past been the subject of interstate commerce

If this court should disagree with the construction of the trial court and agree with the narrow construction of the Circuit Court, Delia should nevertheless be freed because he was not tried upon such a construction of the statute.

It was not necessary for defendant to except to the charge of the court or to make any request for any further charge beyond that given. Counsel for Delia agreed with the interpretation of the statute by the trial court, but urged before that court and submits to this court that so construed the statute is unconstitutional.

II.

SECTION 2(f) IS A REGULATION OF INTRASTATE COMMERCE AND VIOLATES THE TENTH AMENDMENT

Section 2(f) as construed by the trial court is not a valid regulation of interstate commerce. It is an exercise of the police power reserved to the states. It regulates the possession of articles lawfully within a state and completely at rest therein. The fact that the articles were at some time in the past the subject of interstate commerce does not serve to make them subject to federal regulation.

Firearms and ammunition may be manufactured in one state and legally and lawfully transported to another.

Having been so transported, they come to rest therein. They may thereafter be sold in retail establishments, purchased, possessed, sold and resold by countless persons. They may be acquired by purchase, gift or inheritance. They may be obtained from regular dealers or from private persons.

The Federal Government has no right to regulate receipt or possession of such articles after they have come to rest within a state. This regulation of firearms and ammunition has no relation whatsoever to the previous interstate transportation.

If such a regulation were valid, the federal government could take over all of the police power of the state. For example, it could punish the theft of any article which had ever been manufactured outside of the state in which it was stolen. Without going into further examples, the federal government could regulate in the minutest detail the use of all articles brought into the state and completely at rest therein.

The case of *Keller v. United States*, reported in 213 U. S. 138, arose under "An act to regulate the immigration of aliens into the United States." The defendant had been found guilty under that part of the act which punished:

> "* * * whoever shall keep, maintain, control, support, or harbor in any house or other place, for the purpose of prostitution, or for any other immoral purpose, any alien woman or girl, within three years after she shall have entered the United States, * * *" 213 U. S. 139.

The court held: [in the case at bar there is no time limit whatsoever]

"The single question is one of constitutionality. Has Congress power to punish the offense charged, or is jurisdiction thereover solely with the State? Undoubtedly, as held, 'Congress has the power to exclude aliens from the United States; to prescribe the terms and conditions on which they may come in; to establish regulations for sending out of the country such aliens as have entered in violation of law; * * *.'

"* * * While the keeping of a house of ill-fame is offensive to the moral sense, yet that fact must not close the eye to the question whether the power to punish therefor is delegated to Congress or is reserved to the State. Jurisdiction over such an offense comes within the accepted definition of the police power. Speaking generally, that power is reserved to the States, for there is in the Constitution no grant thereof to Congress" (213 U. S. 143).

"As to the suggestion that Congress has power to punish one *assisting in the importation* of a prostitute, it is enough to say that the statute does not include such a charge; * * * In view of those facts the question of the power of Congress to punish those who assist in the importation of a prostitute is entirely immaterial." (213 U. S. 147, 148).

Under the doctrine of this case, Congress might regulate the interstate transportation of firearms and ammunition and might prohibit their receipt in interstate commerce by a class such as defendant, but it may not regulate subsequent possession of these articles after they have come to rest within a state.

The Keller case has been cited in subsequent federal decisions to illustrate exactly the point we make. In the

case of *Steinfeldt v. United States*, 209 Fed. 879, the court held valid an act making it a crime for one to receive, conceal, buy or sell opium knowing it to have been imported contrary to law as a valid exercise of the power of Congress to regulate foreign commerce since the acts therein prohibited, encourage and induce the unlawful importation.

> "* * * To receive or conceal opium after it is imported and with knowledge of its illegal importation, is in effect to *participate* in the illegal importation. It is an act which encourages, induces, and supplements the act of the *illegal importer* * * *" (209 Fed. 880).
>
> "The case is distinguishable from Keller v. United States * * *, *the distinction to be observed between that case and this is the fact that the harboring which was forbidden by law had nothing to do with the unlawful importation, was entirely disassociated therefrom, and was purely a regulation as to dealings by persons who, in the matter involved, were subject only to state regulation* * * *." (Italics supplied.)

In the case of *Brolan v. United States*, 236 U. S. 216, the court upheld the power of Congress to prohibit possession of opium known to have been illegally imported. It distinguished *Keller v. United States* relied upon by the defendant, pointing out that the White Slave Act involved in that case:

> "* * * punished not the harboring of persons for immoral purposes who had been brought into the United States in violation of the prohibition against importation, but its provisions also embraced the harboring of persons for immoral pur-

> poses if they were aliens even though they had come into the United States lawfully. The basis upon which the Keller case proceeded was so manifest that Congress amended the act by making the penal clause which was held unconstitutional, applicable only to those immoral aliens who had come into the United States in violation of the prohibitions of the act." (236 U. S. 221, 222).

It should be noted that the Federal Firearms Act is not an attempt to control the subsequent possession of a firearm, which has been previously shipped in interstate commerce contrary to law. No question of "contrabrand of commerce" is involved. The statute regulates subsequent possession of firearms and ammunition which has been lawfully and legally imported into a state. The act does not prohibit all interstate commerce in firearms and ammunition. Such commerce was and is legal. The statute prohibits the subsequent possession of this lawful and legal commodity by a particular small class after it has come to rest within a state. If the revolver in question had been shipped in interstate commerce contrary to law, then its subsequent receipt or possession might be constitutionally prohibited under the doctrine of the opium and smuggling cases. Section 2(f) of the Federal Firearms Act does not prohibit possession based upon prior illegal transportation or attempt to prohibit possession of all firearms. The revolver was manufactured between 1900 and 1920 in the State of Massachusetts. It could have been brought into Michigan legally and could have been innumerable times legally transferred within the state. The subsequent receipt or possession by defendant of this revolver is in no wise related to its previous interstate shipment.

Articles heretofore shipped in interstate commerce which have come to rest within a state are not subject to federal regulation.

In the case of *Schechter Corp. v. United States*, 295 U. S. 495, it was held:

> "Act is unconstitutional because it exceeds the power of Congress to regulate interstate commerce and invades the power reserved exclusively to the States" (Syllabus 4).
>
> "So far as the poultry here in question is concerned, the flow in interstate commerce had ceased. The poultry had come to a permanent rest within the State. It was not held, used or sold by defendants in relation to any further transactions in interstate commerce and was not destined for transportation to other states" (295 U. S. 495).

We submit that the act is unconstitutional because it is not a regulation of interstate commerce and is an exercise of police power exclusively reserved to the states.

The case was tried in the district court upon the broad construction of the statute, that guilt was established if the defendant possessed a firearm or ammunition which had at any time in the past been the subject of interstate commerce. So construed, the section is unconstitutional, because not a proper regulation of interstate commerce.

We again call attention to the fact that should this court reject this construction of Subsection 2(f), and agree with the Circuit Court of Appeals that the act applied only to those who actually receive the articles in the course of interstate commerce, Delia must be freed because he was not tried on such a construction of the statute.

III.

IF SUBSECTION 2(f) IS CONSTRUED TO PROHIBIT RECEIPT ONLY IN THE COURSE OF INTERSTATE COMMERCE, THE COURT SHOULD HAVE DIRECTED A VERDICT FOR THE DEFENDANT BECAUSE THERE WAS NO EVIDENCE TO GO TO THE JURY

The remainder of our brief is devoted to the effect and validity of the presumption predicated upon the narrow construction placed upon subsection 2(f) by the Circuit Court of Appeals and contended for as correct by the government in its brief before this court. If the statute is so construed, defendant was guilty only if he received the firearm and ammunition in the course of interstate commerce. It is stipulated that there was no evidence whatsoever of this fact (agreed statement par. 5, R. 7). The Government relies entirely upon the *prima facie* or presumptive evidence to prove receipt in the course of interstate commerce.

> "Nevertheless, it must be kept in mind that the peculiar effect of a presumption 'of law' (that is, the real presumption) is merely to invoke a rule of law compelling the jury to reach the conclusion *in the absence of evidence to the contrary* from the opponent. If the *opponent does* offer evidence to the contrary sufficient to satisfy the judge's requirement of some evidence, the presumption disappears as a rule of law, and the case is in the jury's hands free from any rule." *Wigmore on Evidence*, 3rd Ed., Sec. 2491, Vol. IX, p. 289.

> "PRESUMPTON AS EVIDENCE.—The effect of a presumption is to invoke a rule of law which compels the jury to return a verdict in accordance therewith, in the absence of any evidence to the con-

trary from the other side. If the opponent does present such evidence, then the presumption vanishes, and the jury may consider the proof free from any such rule. Thus, the presumption that death resulted from an accident or natural causes rather than from suicide, the presumption of due care or freedom from negligence, the presumption that an official or an official body charged with the performance of governmental duties acted honestly in his or its official duties, the presumption of good character in behalf of the defendant in a criminal prosecution, or the presumption of the relationship of master and servant existing between the owner of a car and the driver thereof when met by rebutting proof is not evidence and is not to be treated as such by the jury in arriving at a verdict. Such a presumption merely aids in establishing a *prima facie* case and has no probative effect when countervailing proof is given." *20 Am. Jur.* 170, Evidence, Sec. 166.

In the case of *Connecticut Mutual Life Ins. Co. v. Lanahan*, 112 Fed. (2nd) 375 (Circuit Court of Appeals, Sixth Circuit), it is stated:

> "The presumption against suicide is not to be treated as evidence and disappears when testimony is offered to rebut it." (Syllabus 4.)

In the case at bar the defendant rebutted the presumption by direct testimony that the articles were not received by him in interstate commerce. After this testimony the statutory presumption sufficient to convict in the absence of testimony was gone and the jury was left to weigh the evidence entirely free of the statutory presumption. The burden of proof remained with the government. It is

agreed that there was *no evidence* whatsoever that defendant had shipped, transported or received the articles in interstate commerce. The court should have directed a verdict of not guilty for the defendant.

It was our position in the trial court and in the Circuit Court of Appeals that this *prima facie* or presumptive evidence, if it were valid, was completely rebutted when defendant came forward and introduced evidence tending to prove that he did not possess the articles within the meaning of the statute and did not receive them in the course of interstate commerce, and that the trial court should have directed a verdict for defendant.

It was unnecessary for the Circuit Court of Appeals to answer this question because of its determination that the presumption itself was invalid and it will, of course, be unnecessary for this court to do so if it affirms that decision. However, if this court should not agree that the presumption is invalid then it will be necessary to determine its effect. This problem is also discussed in point I of the brief for petitioner in the Tot case and is argued by the Government in its brief in that case.

We call to the court's attention that the trial court agreed with us that the presumption had been rebutted. The trial court denied the motion for a directed verdict only because of its construction of the statute that defendant was guilty if he possessed a firearm or ammunition which had at any time *in the past* been transported in interstate commerce. Concerning the presumption itself the trial court correctly charged the jury that the presumption had "little weight here because of the fact that the defendant has taken the stand in his own behalf and he denies the charges made in the indictment" (R. 22).

IV.

THE PRESUMPTION OF INTERSTATE COMMERCE BASED ON POSSESSION IS UNREASONABLE AND CONTRARY TO DUE PROCESS OF LAW

The presumption contained in Section 2(f) of the Federal Firearms Act that a person, previously convicted of a crime of violence, in possession of a firearm or ammunition received them in the course of interstate commerce subsequent to the effective date of the act, violates the Fifth Amendment, which provides that "no person shall be * * * deprived of life, liberty or property without due process of law. * * *"

The Circuit Court of Appeals so held, and we refer to its opinion (R. 26-31) for a concise statement of the argument and authorities to the effect that the presumption is invalid. We will confine our discussion largely to answering the arguments presented by the Government.

A. There is no rational connection between possession of firearms or ammunition, and its receipt in the course of interstate commerce subsequent to the effective date of the act.

Delia was convicted under two counts. Count 1 charged that he did receive and possess a firearm * * * (R. 5) and Count 2 charged that he did receive and possess * * * cartridges * * * (R. 5). He was given the maximum sentence of five years on each count to run consecutively, or a total of ten years.

The Government concedes that there is no rational connection between possession of *ammunition* and receiving it in the course of interstate commerce, and relies on other arguments to support the validity of this presumption (U. S. brief p. 30).

The Government also concedes that there is no rational connection between possession of either a firearm or ammunition and receipt *subsequent* to the effective date of the act, where the guns have been in existence for a substantially longer period before than after the act (U. S. brief p. 39). The Act became effective July 30, 1938. In the instant case the gun had been manufactured from 18 to 38 years before the effective date of the act and was found in Delia's possession only three years thereafter. In the *Tot* case the gun was manufactured 19 years before the act became effective and was found in Tot's possession only 50 days thereafter.

The government only contends that the presumption is valid under the rational connection test as to firearms, not ammunition, and as to receipt in interstate commerce in general, though not to such receipt subsequent to the effective date of the Act.

In support of this position the Government cites the practical difficulty of intrastate acquisition of guns by men like defendant, because of state statutes prohibiting such acquisition, and argues that for that reason it is probable that the firearm was obtained in interstate commerce. That is the substance of the argument. "Firearm" is defined in Section 1 of the Federal Firearms Act as "any weapon by whatever name known which is designed to expel a projectile or projectiles by the action of an explosive." However, Michigan law does not restrict in any manner the possession of firearms with a barrel of more than 30 inches (Mich. Statutes Annotated, Sec. 28.91. The presumption of interstate commerce, if valid, would operate as to all firearms regardless of the length of barrel.

Other states do not have any prohibitions against intrastate acquisition or possession (only 31 states have any

firearm control laws according to the Government's brief p. 19). Even a person previously convicted of a crime of violence could in such states legally acquire a firearm. On the other hand, for such a person to receive a firearm in interstate commerce would not only subject him to the penalty of the Federal Firearms Act, but would also subject the person from whom he received the firearm to such penalty. Nevertheless, if the presumption of receipt in interstate commerce is valid, it would also apply to persons in the states where firearms can be legally acquired by them.

It can hardly be presumed that persons previously convicted of a crime of violence would in such states receive a firearm from another state in violation of the laws of the United States, when the firearm could be lawfully and easily obtained by them within the state in intrastate commerce. The probabilities are that persons in such states would acquire guns there legally.

Receipt in interstate commerce is prohibited to persons previously convicted of a crime of violence in all states under Section 2(f) of the Federal Firearms Act. Section 2(a), prohibits any manufacturer or dealer, except those having a license, to ship or transport any gun or ammunition in interstate commerce; Sec. 2(c) prohibits licensed dealers to ship or transport to any person not having a State license in those states which require one; and Sec. 2(d) prohibits any person to ship or transport knowing or having reasonable cause to believe that the receipient has been previously convicted of a crime of violence. Where acquisition both interstate and intrastate is prohibited, there is no probability that the firearm was acquired in one manner rather than another, and, therefore, there should be no presumption of interstate acquisition.

The Government quotes several statements made before the Senate Special Committee on Crime, which have apparently been culled out of a mass of testimony. The statements themselves, however, do not support the validity of the presumption in question. That one fourth of guns confiscated by police officers in N. Y. City had been "bootlegged into" the state (testimony of N. Y. City Police Chief, Gov't. brief p. 24) does not support a presumption of receipt in interstate commerce arising from possession. Rather it shows that the probalities are 3 to 1 the other way. Even this testimony is based on a factual situation, pertaining only to some states, and to a period 15 years prior to the passage of the act.

Not only is the Government's argument, that there is a presumption of interstate acquisition, invalid for the reasons discussed, but affirmative evidence in the case at bar negatives such a presumption (R. 11, 14).

There are thousands of firearms in Michigan having already come to rest both in the hands of dealers and of private persons, and it is, therefore, unreasonable to presume that the firearm possessed by Delia was received in interstate commerce rather than acquired locally within the state. The police officer expert, who testified in behalf of the Government, stated that the type of firearm possessed by Delia was in common display in the State of Michigan about 1920, and that at the time of trial was commonly possessed.

> "Q. And you have seen many, many guns similar to Government's Exhibit 3?
>
> A. In the last four or five years the big un of them is that type of gun" (R. 11).

> "Q. So along that time [1920] this type of gun, which is Government's Exhibit 3, was in common display in the State of Michigan?
>
> A. Oh, it was, yes; that is right" (R. 14).

Even if there were a rational connection between possession and receipt in intrastate commerce sufficient to support such a presumption, it could not be extended to include receipt subsequent to the effective date of the act. The Government admits that there is no probability in this regard (U. S. brief p. 39). However, the Government contends that if there were a rational connection between possession and receipt in interstate commerce, Congress had the power to "fill" this gap by means which might not be otherwise valid (U. S. brief pp. 40-42).

The cases cited by the Government do not support so much "filling." It is not the law that because two presumptions (that of interstate commerce and that of receipt subsequent to the effective date of the Act) are necessary to establish the elements of the offense and one is a reasonable presumption and the other unreasonable, that the unreasonable one will nevertheless be sustained merely because the statute would be otherwise unworkable.

We do not quarrel with the rule and the cases cited in support thereof that Congress may regulate purely intrastate acts where necessary to effectuate interstate regulation. Certainly we approve the decision of this court in *U. S. v. Darby*, 312 U. S. 100, sustaining the Fair Labor Standards Act. Regardless of whether Congress had the power to regulate possession of firearms within a state as a means of regulating interstate commerce (this problem is discussed in a later part of the brief), Section 2(f) is not and does not even purport to be such a regulation.

There is no relationship between the cases cited by the Government and the presumption that one in possession in 1941 of an article 21 to 41 years old received it subsequent to 1938. Nor can the act be construed as requiring one to create or preserve records of transactions prior

to the effective date of the act. Such an act would be clearly ex-post-facto.

The presumption of receipt subsequent to the effective date of the act is, of course, part of the total presumption. While we have followed the Government's division of the presumption into two distinct parts for the purpose of rebuttal, actually there is only one presumption and in the final analysis must be considered in its entirety.

The Government claims that there is rational connection between the mere possession in 1941 by Delia of a firearm manufactured between 1900 and 1920 and the offense of which he is charged, i.e., having received the firearm subsequent to July 30, 1938, in the course of interstate commerce. We submit that the presumption as a whole cannot be supported under the rational connection test either as to firearms or as to ammunition.

B. Unavailability of proof by the Government does not validate the presumption in Section 2(f).

The Government contends that even though there is no rational connection between the fact proven and that presumed, the presumption may be sustained solely on the ground that it is difficult for the Government to prove the defendant guilty, but easy for the defendant to prove himself innocent. The government contends that on the basis of this test it is valid to presume receipt of both firearms and ammunition not only in interstate commerce, but also subsequent to June 30, 1938 (U. S. brief pp. 26-29). It is not the rule that greater opportunity of knowledge and accessability of proof to the defendant is sufficient in and of itself to validate the presumption. These factors in and of themselves are not sufficient to sustain the validity of a presumption, but are only considered together with other factors. The cases cited by the government were not

decided on the exclusive consideration of opportunity of knowledge and accessability of proof.

The case of *Burnet v. Houston*, 283 U. S. 223, is not in point, and is cited apparently only to acknowledge authorship of a phrase. If a burden is upon a litigant, unavailability of proof is, of course, "a misfortune to be borne by him." The citation seems out of place, however, in the middle of an argument predicated entirely upon the fact, that because the Government cannot prove defendant guilty, this misfortune should be shifted to the defendant.

The Government relies apparently on *Yee Hem v. United States*, 268 U. S. 178; *Casey v. United States*, 276 U. S. 413; and *Morrison v. California*, 291 U. S. 82. None of the other cases cited in this section have any relation whatsoever to this point, and are apparently cited in support of other statements.

In the case of *Yee Hem v. United States*, 268 U. S. 178, it was clear that there was a rational connection between possession of opium more than 14 years after its importation into the country had been prohibited, and the presumed fact of concealment after importation. This decision was not based solely on greater opportunity of knowledge and accessibility of proof to the defendant.

In the case of *Casey v. United States*, 276 U. S. 413, the court specifically held that "With regard to the presumption of the purchase of a thing manifestly not produced by the possessor, there is a 'rational connection between the fact proved and the ultimate fact presumed.' *Luria v. United States*, 231 U. S. 9, 25; *Yee Hem v. United States*, 268 U. S. 178, 183." This case also was not decided solely on the greater opportunity of knowledge and accessability of proof to the defendant.

The case of *Morrison v. California*, 291 U. S. 82, arose under a state statute which prohibited occupancy of land

for agricultural purposes by an alien ineligible for citizenship, and which further provided that upon proof of occupancy of land by any defendant the burden of proving citizenship or eligibility to citizenship developed on the defendant. This presumption was held invalid, because there was no rational connection between the occupancy of land by a defendant and his presumed lack of citizenship or eligibility thereto. "No such probability of wrongdoing grows out of the naked fact of use or occupation as to awaken a belief that the user or occupier is guilty if he fails to come forward with excuse or explanation" 291 U. S. 90.

Judge Cardozo referring to the effect of a disparity between the opportunity for knowledge of the prosecution and that of the defendant did not mean to imply that any presumption is valid merely because of such disparity. It was discussed as one consideration. "For the moment we assume, *without intending to decide*, that strong considerations of convenience, if they existed, *might* cast upon the tenant the burden of proving his qualifications and thus disproving guilt." 291 U. S. 94.

In any event, this test is applicable only in cases of general prohibition where the fact which the statute requires the defendant to prove is an exception to the general rule.

Wigmore on Evidence, Third Edition, Vol. IX. Sec. 2486, p. 275,
Greenleaf, Evidence, Vol. 1, Sec. 79.

In the instant statute receipt in intrastate commerce cannot be said to be an exception to a general regulation of acquisition or possession because Congress has no power to regulate purely intrastate transactions (See Section C following).

Even under the availability of proof test, Justice Cardozo makes it clear that a presumption will not be valid if there is a "probability of injustice to the accused" or "preponderating hardship to the defendant," 291 U. S. 94. He also makes it clear that the possibility of not being believed by the jury is an element to be considered in the "probability of injustice or preponderating hardship to the defendant," and not to be dismissed as a misfortune to be borne by him. "Moreover if he were to profess ignorance and ignorance were an excuse, *the trier of the facts might refuse to credit him*," 291 U. S. 98. Finally he concludes, that there may be a distinction between the rule in criminal and civil cases. "What has been written applied only to those provisions of the statute that prescribe the rule for criminal causes. Other considerations may or may not apply where the controversy is civil. We leave that question open," 291 U. S. 96, 97.

So it appears in any event, even in those cases where the greater opportunity of knowledge and accessibility of proof by the defendant may be a consideration, a presumption is valid only when it results in no "probability of injustice or preponderating hardship to the defendant," 291 U. S. 94. To pass legislation which by its very terms applies only to those previously convicted of a crime of violence and to declare them guilty unless they disprove the elements of the offense, which can be done only by their own testimony, does create a "probability of injustice and preponderating hardship to the defendant," because it is well known that "the trier of the facts might refuse to credit him" 291 U. S. 98.

While such persons are not entitled to special favors and are forced in many instances like others to run the risk of having their story disbelieved, a statute which applies only to such persons, creates a strong probability

of injustice and preponderating hardship to them and renders the statute invalid.

C. Section 2(f) cannot be construed as a general prohibition of all possession with an exception of receipt in (1) intrastate commerce or (2) interstate commerce prior to the effective date of the Act.

The Government contends "that if Congress had the intent and the power under the commerce clause to make it a substantive crime for men like defendant to possess guns or ammunition or to acquire them at all, its roundabout achievement of something less than that result by imposing a presumption of receipt in interstate commerce springing from possession is valid under the due process clause even if the inference of that particular sort of receipt be regarded as unfair or improbable" (U. S. brief, p. 33).

However, even if the argument of the Government should be accepted its conclusion can not be sustained because the facts do not support either of the conditions set forth in the argument. First, Congress had no power under the commerce clause to prohibit defendant from possessing a firearm or ammunition as a means of regulating subsequent interstate transportation or shipment, and second, it had no intention of doing so, if it had such power.

The theory of the Government that Congress could make unlawful possession of firearms or ammunition by one previously convicted of a crime of violence as a means of regulating probable subsequent interstate transportation of such articles, is remote and far fetched. (To support the Government's theory, the prohibition would have to apply to guns possessed before the effective date of the act as well as those received subsequent thereto.)

This alleged probability of subsequent interstate transportation of such articles is not a matter of common knowledge, nor is it supported by the figures relied upon by the Government in the footnote on page 36 of its brief.

The most favorable statistic to the Government is that 5.1% of all crimes and 13.8% of all gun crimes were committed by persons within the state less than one month. And this figure of 13.8% is based on a record of 16 out of 116 offenses committed in 1923, fifteen years before this act was passed. We submit the Government's figures are meaningless.

Congress made no finding of such a probability of subsequent interstate transportation. The facts recited in the brief of the Government make it clear that Congress did not believe that it had the power to regulate such possession on the ground that it might affect subsequent interstate transportation. On the contrary, it appears to be quite clear that while Congress desired to prohibit all possession, it decided that possession "is a matter within the power of the states and not the Federal Government." (U. S. brief p. 34.) Certainly this court cannot take judicial knowledge that the probabilities of subsequent interstate transportation are so great as to warrant federal regulation of possession in the face of such Congressional opinion.

If Congress had the power to regulate intrastate possession as a means of regulating subsequent interstate transportation, it did not intend to do so in this act and it should not be so construed by this court in the absence of such intent.

The mere reading of the statute and indeed the Governments own argument makes it clear that Congress had absolutely no intent of regulating all possession and con-

ferring an exception to those who received the firearm or ammunition in intrastate commerce or in interstate commerce prior to the effective date of the Act and did not even believe that it had such power. Had Congress possessed or believed that it possessed the power to regulate all possession as a means of regulating subsequent interstate transportation it is inconceivable that it would have granted such exceptions. The present act is not an "artificial or clumsy way" (*Ferry v. Ramsey*, 277, U. S. 94) on the part of Congress of regulating subsequent interstate commerce. The Act had it been based on such a power would have contained entirely different provisions.

The fact is that Congress intended to and did prohibit only receipt in the course of interstate commerce but in its zeal to secure compliance presumed violation from facts which had no rational or logical connection thereto. Even if it were possible for Congress to accomplish this objective by the exercise of other constitutional powers it cannot be said to have actually done so in this instance by a clumsy or artificial way and the statute cannot be construed as equivalent thereto.

To recapitulate: Even if the Government's argument were sound that the presumption should be sustained if Congress had the power to prohibit all possession and grant a limited exception to those who could prove receipt in intrastate commerce or receipt prior to the effective date of the act the presumption is nevertheless invalid because:

(1) Congress had no power to prohibit all possession: and

(2) If it had such power the present statute cannot be realistically construed as the exercise of such power with an exception.

D. Defendant can question the constitutionality of Section 2(f).

The Government contends that had Congress prohibited possession of a firearm or ammunition by one previously convicted of a crime of violence regardless of whether received in interstate or intrastate commerce under a supposed power to regulate its probable subsequent interstate transportation, that even if Congress did not have such power the statute would nevertheless apply to the extent of the constitutional power of Congress as a regulation of present receipt in interstate commerce and that defendant could not question the constitutionality of such a statute unless he could prove that he received the firearm or ammunition in other than interstate commerce.

Had Congress passed such a statute as that described, it would have been absolutely invalid and could not have been sustained by limiting its scope to a prohibition of only interstate receipt.

In the *Trade Mark Cases*, 100 U. S. 82, the court held:

> "It has been suggested that if Congress has power to regulate trade marks used in commerce with foreign nations and among the several states, these statutes shall be held valid in that class of cases, if no further * * *. While it may be true that when one part of a statute is valid and constitutional, and another part is unconstitutional and void, the court may enforce the valid part where they are distinctly separable so that each can stand alone, it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body." (100 U. S. 98.)

In the case of *Yu Cong Eng v. Trinidad*, 271 U. S. 500, the court held:

> "The effect of the authorities we have quoted is clear to the point that we may not in a criminal statute reduce its generally inclusive terms so as to limit its application to only that class of cases which it was within the power of the legislature to enact and thus save the statute from invalidity." (271 U. S. 522.)

In the case of *Thornhill v. Alabama*, 310 U. S. 88, defendant was charged under a statute prohibiting loitering or picketing. This court in an opinion by Justice Murphy held that the statute as construed by the state court was violative of freedom of speech and the press. It was argued by the State that defendant could "not complain of the deprivation of any right but his own." 310 U. S. 96. The court held:

> "An accused after arrest and conviction under such a statute, does not have to sustain the burden of demonstrating that the State could not constitutionally have written a different and specific statute covering his activities as disclosed by the charge and evidence introduced against him." 310 U. S. 98.

The rule invoked by the Government is the well known rule that "only those who have been injured as a result of the denial of constitutional rights can invoke our jurisdiction on constitutional questions." (*Voeller v. Neiston Co.*, 311 U. S. 531, 537.) Can there be any question that defendant in the case at bar was sufficiently injured to entitle him to question the validity of the statute?

If the Government's argument were sound, any presumption would be constitutional, provided only that the

ultimate fact presumed were within the court's constitutional power, because in any such case the Government could have prohibited the act upon which the presumption was based, and require the defendant to prove that the act which he committed was not within the constitutional power. Under such a rule the federal courts could always presume jurisdiction.

E. The presumption in its entirety is invalid.

In the final analysis, the determination of "due process," which is involved, is not and should not be determined by fancy, legalistic, artificial tests and arguments. Due process is not a mathematical formula, but is the requirement of a fair trial, that kind of trial which is in accordance with our tradition of justice. Defendant was found in possession of a firearm manufactured from 21 to 41 years ago (R. 12) and ammunition manufactured between five and ten years ago (R. 13). Firearms of this type have been common in the state of Michigan at least since 1920 (R. 14) and are still common (R. 15). The ammunition could, of course, be lawfully and easily obtained by defendant within the state of Michigan. The statute made it a crime for defendant to receive this firearm with the ammunition contained therein in interstate commerce, subsequent to June 30, 1938, and then presumed such receipt from the mere fact of possession. The Government concedes that as to the ammunition there is no rational connection between possession and receipt in interstate commerce and also concedes that as to the firearm there is even greater probability of receipt by the defendant prior to June 30, 1938, than subsequently thereto.

Notwithstanding the lack of probabilities, the statute required defendant to prove his innocence by proving

receipt in intrastate commerce or receipt prior to the effective date of the act. It is inherent in the situation that such persons as defendant will have to rely almost entirely on their own testimony and that such testimony is not likely to be believed by the jury. Such a burden of proof is unfair.

Finally we observe that there is no public policy the effectuation of which is dependent upon the validity of this presumption. Without Section 2(f) the Federal Firearms Act remains a comprehensive and workable statute and controls actual interstate shipment and transportation of firearms and ammunition. The regulation of possession of firearms and ammunition which this section indirectly seeks to accomplish is a police power which can and should be exercised by the states. It is not a matter that requires regulation by the Federal Government. State laws can and do regulate such possession to whatever extent its people desire.

CONCLUSION

For these reasons it is respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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